of difference are so marked that it cannot be cited as a precedent. Therein it was decided only that a judgment at law against a corporation could not be revived against it after its dissolution.

H. H. INGERSOLL.

Knoxville, Tenn.

Supreme Court of Indiana.

THE STATE OF INDIANA v. CALVIN SMITH.

In an indictment for an assault and battery, it is necessary to allege that the touching, striking or beating was done unlawfully.

A court cannot infer that a rude, insolent or angry touching was also unlawful.

It is not, however, necessary that the word "unlawful" should be used; but it will be sufficient if another term of the same import and meaning is employed.

ON appeal from the Tipton Circuit.

The indictment charged that the appellee, at a time and place therein named, "did unlawfully commit an assault and battery upon the person of one Michael E. Stokes, by then and there, in a rude, insolent and angry manner, touching, striking, beating, bruising and wounding him, the said Michael E. Stokes." The appellee moved to quash the indictment, because it was not averred that the touching was unlawful. The court below sustained the motion, whereupon the state appealed.

The following is the statute under which the indictment was framed: "Every person who, in a rude, insolent or angry manner, shall unlawfully touch another, shall be deemed guilty of an assault and battery, and upon conviction, shall be fined not exceeding one thousand dollars, to which may be added imprisonment not exceeding three months."

The opinion of the court was delivered by

ELLIOTT, J.—It is undoubtedly true, as the appellee contends, that an indictment for the offence of assault and battery must show that the touching was unlawful: *State* v. *Murphy*, 21 Ind. 441; *Cranor* v. *State*, 39 Id. 64. An indictment which does not show this leaves out an important and essential ingredient of the offence: *Howard* v. *State*, 67 Ind. 401. It has been repeatedly decided that the court cannot infer that a touching charged to have been unlawful was rude, insolent or angry, but that the manner of the touching must be expressly stated: *Slusser* v. *State*, 71 Ind. 280; *State* v. *Wright*, 52 Id. 307; and there is certainly

stronger reason for holding that courts cannot infer that a rude, insolent or angry touching was also unlawful. The presumption is in favor of innocence and of the legality of facts, and the state must always show some fact or facts countervailing this presumption. It is always necessary, therefore, to show that the touching was unlawful; it is not, however, necessary that the word "unlawful" should be used. It will be sufficient if another term of the same import and meaning is employed: *State* v. *Trulock*, 46 Ind. 289; *Sloan* v. *State*, 42 Id. 570; *Adell* v. *State*, 34 Id. 546; *Cander* v. *State*, 17 Id. 307; *Carneille* v. *State*, 16 Id. 232.

The state contends that, conceding it to be necessary to show that the touching was unlawful, the indictment is still sufficient, because that fact is properly stated.

The argument is that the word unlawfully as used in the clause, "did then and there unlawfully commit an assault and battery upon the person of one Michael E. Stokes," applies to and qualifies the allegations, "by then and there touching, striking and beating the said Stokes." The appellee, upon the other hand, argues that the word unlawfully as used does not apply to the specific acts of touching and striking described, but that in order to have any such force, it should have preceded the word touching. It is, of course, immaterial in just what place a word or allegation of the charging part of an indictment is found, provided it forms part of the description of the offence charged.

An offence is properly charged by a statement of the material facts which constitute it, and not by the statement of mere conclusions of law. The phrase "did then and there unlawfully commit an assault and battery" is a mere conclusion of the pleader and not the averment of a material traversable fact. The word unlawfully, as therein used, is confined in its application and meaning to the general conclusion of the pleader that the accused did commit an assault and battery. The touching, striking and beating are not averred to have been unlawful. It is charged that the touching was rude, insolent and angry, but it is not charged that it was unlawful. The specific facts relied upon by the pleader are, that there was a touching and that it was angry and insolent. but there is no fact stated nor allegation made in that part of the indictment which describes the offence from which it can be concluded as a matter of law that the touching was not lawful. The pleader does, indeed, state generally his conclusion that the

accused did unlawfully commit an assault and battery, but in stating the facts which he alleges constituted the offence, he wholly omits to charge the essential fact of unlawfulness. If the touching was lawful, no offence was committed, and there is nothing in the facts stated from which it can be inferred that the touching was not entirely justifiable and lawful. The facts as stated do not support the pleader's conclusion that an assault and battery was unlawfully committed and without substantive facts for its foundation, the conclusion must go for naught. It was necessary to show that the touching was unlawful, and as the indictment fails to do this, the motion to quash was properly sustained.

Judgment affirmed.

A recent writer upon criminal pleading, referring to the use of the word "unlawfully," says: "The word 'unlawfully' is not often of much value in an indictment; it only asserts a conclusion of law, which, if it arises out of the facts set forth, is unnecessary; and, if it does not, is insufficient. But if a statute, in describing an offence which it creates, uses that word, an indictment framed on the statute is bad if that word be omitted, and it is generally best to insert it, especially as it precludes all legal excuse for the crime:" Heard on Criminal Pleading 159.

A clear distinction is here drawn between the use of the word in a common-law indictment and one founded upon a statute. This distinction is drawn by the judges in the early English reports, and noticed by all writers upon criminal law. The absolute necessity of the use of the word, or its equivalent, in describing statutory crimes, seems to have been held necessary because the statute introduced a new crime, made that criminal which before was not, and the court would not hold an act criminal unless it was so specifically alleged. Since, in many states, all crimes are statutory, it would seem that the rule is followed while the reason for its use, as distinguishing between general and exceptional crimes, had ceased. However this may be, it will be seen that the rule is correctly laid down in the case reported, and is universally followed by the courts.

Hawkins says he can find no express authority for the use of the word "unlawfully" at common law: vol. ii., ch. 25, sect. 96; and he cites 1 Keble 859, and 2 Keble 715. The point is not expressly adjudicated in these cases. There counsel raised this (among several other) objections to the indictment, but all their objections were overruled without referring to any of them specially. And Hawkins says it was expressly held that its use was not necessary in an indictment for a riot, because the act itself contained in the indictment so plainly appears to be unlawful; citing 2 R. Abr. 82; Cro. C. C. 43. At an early day, in Indiana, the Supreme Court, speaking of a common-law indictment, said: "An indictment must set forth an unlawful killing or it will be defective. If it does describe the manner of killing, so as to show clearly that it was unlawful, the insertion of the word 'unlawful' is unnecessary; and, if it does not so describe the killing, the word 'unlawful' would not aid the description: *Jerry* v. *The State*, 1 Blackf. 395. This case is approved in *Weinzorpflin* v. *State*, 7 Blackf. 195, although a different rule is said to prevail in indictments founded

on a criminal statute. So in *State* v. *Bray*, 1 Mo. 180, the word "unlawfully" was held not necessary: *State* v. *Williams*, 3 Foster (N. H.) 321. And where a statute merely divides a common-law crime into degrees and apportions the punishment, the indictment does not follow the general rule concerning statutory offences; charging the crime as a common-law offence is sufficient: *Davis* v. *State*, 39 Ind 355.

Where an indictment is framed upon a statute an entirely different rule prevails as to the use of the word "unlawfully." "But where a statute uses the word 'unlawfully' in the description of an offence, it is certain that an indictment grounded upon it must use the word *illicitè*, or some other tantamount:" 2 Hawk. Ch. 25, sect. 96; *Commonwealth* v. *Twitchell*, 4 Cush. 74; *Curtus* v. *The People*, Breese (Ill.), 2d ed. 256; *Barber* v. *The State*, 13 Fla. 675. No authority is cited to maintain this proposition, but it is assumed as an unquestionable fact. Chitty cites Bac. Abr., "Indictment," G, 1, and Cro. C. C. 43. This position is not overthrown by the case of *Beatson* v. *Rushforth*, 2 Marsh. (Eng.) 362, which was a case founded upon a penal statute; nor by Doug. 699, *Ratcliffe* v. *Eden*, Cowp. 485, or by *The King* v. *Judd*, 2 T. R. 255; see *King* v. *Burnett*, 4 M. & S. 272; *Weinzorpflin* v. *The State*, 7 Blackf. 195. Where the words of a statute were, "if any father shall have sexual intercourse with his daughter, knowing her to be such," and the indictment alleged that the defendant A *unlawfully* did have sexual intercourse with his daughter B, the said B then and there knowing that she, the said B, was his, the said A's daughter," it was held that this was insufficient, as not containing the averment of the knowledge of relationship. The word "unlawfully" was not equivalent to the words of the statute, did not constitute such averment, and added nothing to the indictment: *Williams* v. *State*, 2 Ind. 439. But it was held that in an indictment based upon a statute, "if any person shall make an assault with intent to commit murder," &c., the word "unlawfully" was unnecessary: *State* v. *Williams*, 3 Foster (N. H.) 321; so in *Capps* v. *State*, 4 Iowa 502. And it was said, in *United States* v. *Driscoll*, 1 Low. 305, that "the word 'unlawfully' is not often of much value in an indictment." This was spoken with reference to an indictment framed upon a statute. In other cases its use has been held necessary: *Commonwealth* v. *Sholes*, 13 Allen 554. And alleging that the act was done unlawfully does not dispense with a statement of the facts constituting the offence: *Commonwealth* v. *Byrnes*, 126 Mass. 248. But if the statute does not define the crime, but speaks of it by name only, a common-law indictment is sufficient; the word "unlawful" is not essential: *Perry* v. *The People*, 14 Ill. 499; see *Weinzorpflin* v. *The State*, 7 Blackf. 195. In a case decided in 1863, the indictment charged that the defendant "did then and there wear, and carry concealed about his person, a dangerous and deadly weapon." The statute was that any one who shall be convicted of wearing, or carrying concealed, any dangerous or deadly weapon shall be fined, &c. The word "unlawful" was not used in the statute; and it was held that the indictment was sufficient: *The State* v. *Swope*, 20 Ind. 106. So, where the indictment charged that A "did then and there strike, beat and wound, in a rude and insolent manner, with intent then and there, the said B, purposely, feloniously, and with premeditated malice, to kill and murder," framed upon the statute quoted above, it was a sufficient charge of assault and battery: *State* v. *Murphy*, 21 Ind. 441.

And the word "unlawful" may be used instead of another technical term. Thus, it was held synonymous with the word "illegal:" *State* v. *Hayworth*, 3

Sneed 64. But where the indictment alleged that the act was done "feloniously, voluntarily and maliciously," founded upon a statute that declared the act must be done "unlawfully and maliciously," the words used were not an equivalent, and the indictment was held bad: *Rex* v. *Turner*, R. & M. C. C. R. 239; 4 C. & P. 245; 1 Lewin 9. So, the word "feloniously" was held not the equivalent of "unlawfully and maliciously:" 2 Russ. Cr. 1066; *Rex* v. *Turner*, 1 Moody C. C. 239; *Rex* v. *Ryan*, 2 Id. 15. Where an indictment charged that the defendant "wilfully obstructed the public road, &c., contrary to the law," it is a sufficient averment that the act was done unlawfully; *Capps* v. *State*, 4 Iowa 502. The words "wrongfully and injuriously" are the equivalent of "unlawfully" in an indictment for maintaining a nuisance in a highway: *State* v. *Vermont Central Railroad Co.*, 1 Williams (Vt.) 103. "With intent to commit a felony" is substantially the same as "feloniously:" *Dillard* v. *State*, 3 Heisk. 260. Averring that the act was done "maliciously and without any lawful justification" is the equivalent of the averment that it was done "unlawfully:" *Commonwealth* v. *Thompson*, 108 Mass. 463.

Where a statute makes the doing of an act "wilfully and maliciously" criminal, it will not be sufficient in the indictment to charge that it was done "feloniously, unlawfully and wilfully:" *State* v. *Gove*, 34 N. H. 511; nor is "unlawfully and maliciously" the equivalent of "wilfully and maliciously:" *State* v. *Hussey*, 60 Me. 410. So, "feloniously" is not only tantamount to "unlawfully," but is a word of far more extensive and criminal meaning: *Weinzorpflin* v. *The State*, 7 Blackf. 186; *Sloan* v. *State*, 42 Ind. 570; *Greer* v. *State*, 50 Id. 267; *Beavers* v. *State*, 58 Id. 530; *Shinn* v. *State*, 68 Id. 420. "Unlawfully and feloniously" are more than the equivalent of "falsely:" *State* v. *Dark*, 8 Blackf. 526. In *State* v. *Murphy*, 21 Ind. 441, it is said, "one man cannot strike another with the malicious and premeditated intent to murder him—murder being a technical term—without so doing unlawfully."

W. W. THORNTON.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES.[1]

SUPREME COURT OF ERRORS OF CONNECTICUT.[2]

SUPREME COURT OF ILLINOIS.[3]

COURTS OF APPEAL OF LOUISIANA.[4]

SUPREME COURT OF RHODE ISLAND.[5]

SUPREME COURT OF WISCONSIN.[6]

ACKNOWLEDGMENT.

Evidence to Impeach.—In the absence of evidence of fraud, con-

[1] Prepared expressly for the American Law Register, from the original opinions filed during Oct. Term 1881. The cases will probably appear in 14 or 15 Otto.

[2] From John Hooker, Esq., Reporter; to appear in 48 Connecticut Reports

[3] From Hon. N. L. Freeman, Reporter; to appear in 101 Illinois Reports.

[4] From Hon. Frank McGloin, Reporter; to appear in vol. 1 of his reports.

[5] From Arnold Green, Esq., Reporter; to appear in 13 Rhode Island Reports.

[6] From Hon. O. M. Conover, Reporter; to appear in 53 or 54 Wis. Reports.